had not given effect to that possible defect in the qualification of a candidate for election by himself raising the objection. It would, indeed, have been a farce if a candidate had been elected to the Council who had not a sufficient knowledge of either the English or Malay language to understand and take his full share in the proceedings in the Council. It might have been argued that since the Returning Officer had himself raised the objection, on the principle that no man should be a Judge in his own cause, it would have been better for him to have adjourned the matter to enable some other person or body of persons to determine the validity of his objection. But, again, that argument is not open to the petitioner having regard to the express wording of Regulation 25(4) which specifically provides that where there has been an election "the Returning Officer shall *forthwith* proceed to decide on the validity of every objection and, if the objection is allowed, to state the grounds of his decision."

It may well be that his objection should have been in writing. But on a full consideration of the affidavits before me and the evidence adduced I am wholly satisfied that such non-compliance with the provision of the written law did not affect the result of the Petition in that on the evidence before me I am fully satisfied that the petitioner had not that degree of proficiency in the English or Malay language to qualify him for election as a Town Councillor in accordance with the provisions of Regulation 14(b). The Returning Officer, according to the evidence before me, had himself been a former Secretary of the Rural District Council, the meetings of which were conducted both in English and Malay, but mainly Malay. According to the evidence of Inche Hashim bin Itam, the Returning Officer spoke fluent Malay. Indeed, it is difficult to imagine how he could have satisfactorily carried out his duties as Secretary of the Council if he had not done so. The Returning Officer was, therefore, most eminently suitable to judge whether the petitioner had a sufficient degree of proficiency in either English or Malay to take an active part in the proceedings of the Town Council. His view as to the petitioner's insufficient knowledge of Malay for the purpose of taking an active part in Council proceedings conducted in Malay is, indeed, corroborated by the sworn testimony of Inche Hashim bin Itam, to which I have already referred.

For these reasons I have no hesitation in dismissing this Petition.

As I have already said, on the wording of section 32 of the Election Offences Ordinance, 1954, in my view the only ground on which the petitioner could have brought this Petition was on the basis of ground (b), that there had been a non-compliance with the provisions of the written law relating to an election and that such non-compliance had affected the result of the Petition. Again, as I have already said, I am wholly satisfied that the non-compliance of the Returning Officer to put his objection in writing did not affect the result of this Petition. But considering for a moment a variation of the facts of this case, it is a matter of interesting speculation as to what the remedy of a candidate would be if there had, in fact, been a compliance with the written law — and a written objection had been duly lodged by the Returning Officer — and the Returning Officer had then proceeded wrongly to disqualify a candidate who was, in fact, proved to have the necessary qualification in either the English or Malay language. What remedy would be open to such a wrongfully disqualified candidate? I venture to express the opinion that there would be no remedy open to him by way of an election petition under this Ordinance and that his sole remedy, if any, would be by way of invoking the high prerogative jurisdiction of the Supreme Court for the issue of a writ of *certiorari*. Fortunately, however, the matter is not one that I am called upon to decide.

For the reasons I have stated the Petition must be dismissed with costs.

In conclusion, I would express my indebtedness to Mr. Phipps and to the State Legal Adviser, Mr. Ong, for the benefit of their arguments before me.

By consent of both parties, costs fixed in the inclusive amount of $275.

Petition dismissed.

Solicitors: *Hogan, Adams & Allan.*

A. CHANDRASEGARAM v. THE PRIME MINISTER OF THE FEDERATION OF MALAYA

[O.C.J. (Sutherland J.) December 9, 1957]

[K.L. — Originating Motion No. 7 of 1957]

Pension — Whether there is right to — Retrenchment and reinstatement — Non-service period treated as leave without salary "for the purpose of providing continuity of service" — Purpose of — Mandamus for recomputation of pension.

In these proceedings the applicant moved for *mandamus* that the pension granted him in April 1952 be recomputed to include the period between his retrenchment in October 1934 and his reinstatement in October 1936, which period Government had agreed to treat as leave without salary "for the purpose of providing continuity of service."

Held: (1) even assuming *mandamus* will lie in this case, there is no right to a pension;

(2) the remedy if granted would not be complete under the Specific Relief (Malay States) Ordinance, 1950;

(3) the purpose of the words "for the purpose of providing continuity of service" is to ensure that the person would not have for pension purpose the benefit of his service prior to retrenchment and not to include the period of non-service as service;

(4) the application for *mandamus* should in any case be refused owing to the long delay.

Cases referred to:—

(1) *Tan Eng Siong v. Rubber Supervision Licensing Board,* (1950) M.L.J. 226.
(2) *R. v. Marshland Smeeth,* (1920) 1 K.B. 155.
(3) *R. v. Commissioners for Special Purposes of Income Tax,* (1920) 1 K.B. 38.
(4) *R. v. Lords Commissioners of H.M. Treasury,* (1909) 2 K.B. 183.
(5) *R. v. Secretary of State for War,* (1891) 2 Q.B. 326.
(6) *R. v. Lords Commissioners of the Treasury,* (1871) L.R. 7 Q.B. 387.
(7) *S. K. Pillai v. State of Kedah,* 6 F.M.S.L.R. 160.
(8) *In re Nathan* (1883-4) 12 Q.B. 461.
(9) *R. v. Churchwardens of All Saints, Wigan* (1875-6)1 App. Cas. 620.
(10) *Coke & Anor. v. Jones* (1861) 4 L.T.R. 306.

APPLICATION FOR MANDAMUS.

D. G. Ironside for the applicant.

H. S. Ong (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Sutherland J.: — In these proceedings the applicant moved for mandamus. He applied for an order that the pension granted him in April, 1952, be recomputed to include the period of no pay leave as pensionable.

In support, he affirmed that he retired from Government service on 30th April, 1952. In computing his pension the Government failed to include the period between retrenchment in October, 1936. This period should have been included under Pension Regulation 6 (1) (e) of the Pensions Ordinance, 1951. The period between retrenchment and reinstatement was treated as leave without salary granted on grounds of public policy with the approval of the High Commissioner for the purpose of providing continuity of service.

It is significant that applicant in his Affidavit states that the period between retrenchment and reinstatement was treated as leave without salary "for the purpose of providing continuity of service." These last 8 words are, in my view, the key to the correct solution of the problem presented to the Court in this case.

Applicant was on the non-pensionable establishment, not having completed 10 years before retrenchment. Applicant on 17th May, 1952 requested that the period between retrenchment and reinstatement be counted as pensionable service. In his request he stated that this period was treated as leave without salary granted on grounds of public policy with the approval of the High Commissioner for the purpose of providing continuity of service. Here again, in 1952, applicant admits that the period in issue was treated as leave without salary "for the purpose of providing continuity of service." The reply of Government to applicant's request was that the period in dispute was leave on no pay for purpose of continuity of service (again appear these significant words). Government declared there was no question of including that period for computation of applicant's pension.

In reply to applicant's motion, an Affidavit was filed by the Principal Establishment Officer of the Government of the Federation of Malaya. It was contended that applicant has no cause of action maintainable in law because:

(1) Applicant has no property, franchise or legal right in respect of a pension as required by proviso (a) to section 44 (1) of the Specific Relief Ordinance, 1950.

(2) The remedy, if granted, will not be complete as required by section 44 (1) (e) of the same Ordinance.

(3) The applicant is seeking to enforce satisfaction of a claim on the Government and is not entitled to do so by reason of section 44 (2) (b) of the same Ordinance.

Applicant's claim was additionally denied on the grounds that Regulation 6 (1) (e) is not applicable to him and that applicant had not been granted during the said period absence from duty on leave without salary with the approval of the High Commissioner. Attached to the Affidavit in reply was a Federal circular governing the reinstatement of retrenchees dated 20th October, 1934. It was contended on behalf of respondent that the matter is governed by paragraph 4 thereof. In a subsequent Affidavit applicant stated that this reference to paragraph 4 was a wrong reference and that it

should be paragraph 3 (d). This was not denied on behalf of the respondent.

It will be convenient to refer to the terms of this circular at this stage, as applicant admitted that paragraph 3 (d) thereof referred to him. The circular deals with re-employment of retrenchees. It is a statement of policy and of the conditions of re-employment prepared for guidance. The conditions as regards the continuity of service offered to re-employed retrenchees are:—

> Officers on the pensionable or non-pensionable establishment and monthly paid open vote employees who were retrenched on pension or retiring allowance will surrender it on reinstatement and preserve continuity of service, the period of break in service being treated as leave on pension or retiring allowance rates. Such periods will not count in or towards the computation of any pension or retiring allowance for whcih the re-employed retrenchees may eventually become eligible, the concession being granted purely for the purpose of securing continuity of service before retrenchment and after re-employment.

Then comes the significant paragraph 3 (d).

> Retrenchees from the non-pensionable establishment or from open vote on monthly or daily pay who received no retiring allowance or gratuity on retrenchment because their service was less than ten years will on re-employment be permitted to count the period of their retrenchment as leave without pay in order to preserve continuity of service.

This time the noteworthy words occur: "in order to preserve continuity of service".

In reply applicant admitted that paragraph 3 (d) of the circular referred to him. Learned Counsel for the applicant stated that the claim was made under paragraph 3 (d) of the circular already referred to. He emphasized the mandatory nature of Regulation 6 of the Pensions Regulations, 1951, which requires that certain periods shall be taken into account. He also cited *Tan Eng Siong v. Rubber Supervision Licensing Board,*[1] for authority that the Specific Relief (Malay States) Ordinance, 1950, is a modification of the English law of mandamus. He conceded that the Pensions Ordinance is substantially permissive in so far as granting a pension is concerned, but applicant's claim referred to computation which must be carried out as provided by the statute. There is discretion within limits as to granting of pension, but no discretion as to computation. Counsel cited *The King v. Marshland Smeeth,*[2] at page 165 for authority that if a power or discretion only, as distinct from a duty, exists then the prerogative writ of mandamus will not be issued by the Court.

In *The King v. Commissioners for Special Purposes of Income Tax*[3] in the same volume at page 38 appear Lord Esher's words:

> "With regard to the question whether mandamus will lie, I am of opinion that the case falls within the class of cases, where officials having a public duty to perform, and having refused to perform it, mandamus will lie on the application of a person interested to compel them to do so."

Counsel referred to section 5 of the Pensions Ordinance that no officer shall have an absolute right to any pension. Counsel urged that an officer had a qualified right and he cited in aid the marginal note to Article 147 of the Constitution which is: "Protection of Pension rights."

While on this subject, I would point out that section 5(2) of the Pensions Ordinance, 1951, refers to a pension for which an officer would have become "eligible." The *Oxford Dictionary* definition of "eligible" is "fit" or proper to be chosen," and it is interesting that the Pensions Ordinance makes use of the word "eligible" and not "entitled" or some such compelling word.

As to whether the remedy, if granted, would be complete, Counsel agreed that all that is asked for is computation, and that will not give payment.

I would pause here to remark that, approached from this angle, it would appear that were the remedy applied for given, it would not be complete.

Counsel, however, urged that the matter should be taken a step further by reference to section 4 of the Pensions Ordinance, 1951, and stated that payment should follow computation.

He cited *The King v. The Lords Commissioners of His Majesty's Treasury,*[4] at page 191:

> "But here the Act simply imposes upon a public department the duty of determining the proportions which shall be payable from money provided by Parliament and from the police pension fund of the county, and therefore I think that a mandamus will lie in order to set in motion the procedure whereby alone the respective liabilities to pay can be determined."

Counsel submitted that in this case it was accepted that the remedy, if granted, would be complete.

I would point out, however, that this latter aspect of the matter was not dealt with in the case under consideration. Lord Alverstone, C.J., decided that a mandamus will lie in order to set in motion the procedure whereby alone the respective liabilities to pay can be determined. Jelf, J., at page 192 decided that a mandamus will lie to direct the public authority in that case to perform a statutory duty without which the

statute is meaningless and unworkable. In the present case, irrespective of what view might be taken of the method of computation, I would not say that it was a question of the performance of a statutory duty without which the statute is meaningless and unworkable. In my view the case cited is not on all fours with the case with which we are concerned, nor does it materially assist in solving the problem before the Court in the present case. As will later appear, it is distinguishable from the present case in that under the Police Act 1890, there was a right to a pension, whereas in the present case, while I think I understand and feel the force of the applicant's contention and am not without some sympathy for it, I feel constrained by the authorities subsequently cited to rule that there is no right to a pension.

Counsel submitted that under no circumstances can one detract from the absolute grant of leave without pay, and that the words "in order to preserve continuity of service" cannot detract from the grant which has been made.

In my view, however, the words "in order to preserve continuity of service", as they unquestionably do appear in the circular, must be given a meaning. Retrenchees were permitted to count the period of their retrenchment not as leave without pay simpliciter, but as leave without pay in order to preserve continuity of service.

Counsel referred to paragraph 3 (b) of the circular referring to other officers, which refers specifically to the period not counting towards computation of pension.

On this point it is necessary to remember that the circular was prepared for guidance, and merely summarises terms of re-employment and the decisions. Comparing paragraphs 3 (b) and 3 (d), it would be curious if the period were not to be included for retrenchees on pension (who, incidentally, surrendered it), but were to be included for retrenchees who received no retiring allowance or gratuity on retrenchment because their service was less than ten years. In any case, and irrespective of this consideration, we get back to the terms of paragraph 3 (d) of the circular, under which applicant's Counsel stated the claim was made, which are that retrenchees such as the applicant were permitted to count the period of their retrenchment as leave without pay in order to preserve continuity of service.

Learned Federal Counsel, appearing for the respondent cited *The Queen v. The Secretary of State for War*[5] at page 338 where Lord Esher, M.R., says:—

> "Assuming that the Crown were under any obligation to make this allowance to the claimant, a mandamus would not lie against the Secretary of State, because his position is merely that of agent for the Crown, and he is only liable to answer to the Crown whether he has obeyed the terms of his agency or not; he has no legal duty as such agent towards any individual. But the case goes further than that. There is no obligation upon the Crown to make this allowance recognised by the law."

Federal Counsel also cited *The Queen v. The Lords Commissioners of the Treasury*,[6] at page 394 where Cockburn, C.J., says:

> "I take it, with reference to that jurisdiction," (the Chief Justice is referring to mandamus jurisdiction) "we must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim even in appearance to have any power to command the Crown; the thing is out of the question. Over the sovereign we can have no power. In like manner where the parties are acting as servants of the Crown, and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction."

Counsel referred to section 5 of the Pensions Ordinance, 1951, which gave no absolute right to any pension.

He also referred to *S.K. Pillai v. State of Kedah*,[7] at page 171 where Stevens, J., states:

> "But it is to be noted that no right to a pension is conferred. The Pensions Enactments definitely so provide, and the prospect of a pension is on precisely the same footing as the prospect of continued employment or that of promotion. Apart therefore from all considerations of law, it is apparent that such an arrangement as I have outlined does not confer on public servants a legal right as against the Crown to continuity of employment, promotion or pension. This proposition is so securely established that it is needless to cite any authority for it."

This citation appears to be a powerful buttress to respondent's contention that there is no right to a pension.

Counsel submitted that the Pensions Regulations must be considered as a whole. He also cited *In re Nathan*[8] where mandamus did not issue for the statute created no duty between the commissioners and the applicant, whose remedy, if the decision of the commissioners could be reviewed, was by petition of right.

In the present case Counsel submitted that the duty to compute was a duty to Government and not to applicant.

Counsel further urged that the remedy would not be complete because by section 5 there can be no order to pay the recomputed pension.

I agree with this submission.

Counsel for respondent distinguished the case *The King v. The Lords Commissioners of*

His Majesty's Treasury,[4] on the grounds that under the Police Act, 1890, there was a right to a pension, whereas in the present case there is no right to a pension.

Counsel urged that applicant admitted that paragraph 3 (d) of the circular referred to him and that the period between retrenchment and reinstatement was treated as leave without salary for the purpose of providing continuity of service. Counsel referred to Regulation 7 of the Pensions Regulations as the explanation why the words "in order to preserve continuity of service" were imported into paragraph 3 (d) of the circular. The reason was that under Regulation 7 service must be unbroken. Counsel urged that the words, "in order to preserve continuity of service" were inserted to enable the period of service prior to retrenchment to be included in the period of pensionable service.

I agree with this. Counsel also referred to the proviso to Regulation 7 (2) that in calculating a pension granted in pursuance of that paragraph no account should be taken for any purposes of the period during which the officer was not in public service. In my view, the Pensions Regulations must be read as a whole and one regulation must not be divorced from its accompanying regulations.

Counsel cited *R. v. Churchwardens of All Saints, Wigan*[9] in support of the authority that mandamus is a prerogative writ and not a writ of right. The Court has discretion to grant it or not which cannot be questioned. The Court may refuse to grant the writ not only on the merits but upon some delay. In the present case reassessment was refused in 1952 or 1953 but applicant did not file his present application until September, 1957. Counsel cited *Coke and Another v. Jones*[10] where delay of more than a year rendered the application too late. Counsel cited *Griffith's* Guide to Crown Office Practice page 161 that application for mandamus must be within a reasonable time.

In my view respondent's objection to the application on the grounds of the applicant's delay over a period of years is well founded.

Counsel submitted that applicant did not come within Regulation 6 (1) (e) of the Pensions Regulations, 1951. I agree. In my view applicant was not absent from duty on leave without salary granted on grounds of public policy with the approval of the High Commissioner. He was on leave without pay in order to preserve continuity of service.

Counsel submitted that applicant was not absent from duty within Regulation 6 (1) (e). Counsel also submitted that an order to recompute would offend against section 44 (2) (b) of the Specific Relief (Malay States) Ordinance, 1950, and again I agree.

Counsel stated that the Government's concession cannot enable applicant to claim recomputation for a period during which he was out of public service.

Counsel for applicant conceded that the Court has a discretion.

To sum up, I would say that *Pillai's*[7] case cited above is authority that there is no right to a pension even assuming mandamus would lie. Applicant concedes that the statement of policy in the circular applies. Paragraph 3 (d) grants him leave without pay not *simpliciter* but, significantly, for continuity of service. These words, I think, debar applicant's claim, assuming he was entitled to make one. I have not overlooked that earlier in the circular appear words which expressly deal with a certain period's not being taken into account for pension purposes. However, the circular purports to be a guide, and in my view the words "in order to preserve continuity of service" must be given a meaning, and that meaning is that the leave without pay was granted so that, and only so that, applicant would not lose for pension purposes the benefit of his service prior to retrenchment.

Applicant grounds his claim under Regulation 6 (1) (e) and concedes the applicability of paragraph 3 (d) of the circular. The regulation refers to absence from duty on leave without salary granted on grounds of public policy with the approval of the High Commissioner, whereas the circular refers to leave without pay *in order to preserve continuity of service.* The two are not synonymous. I feel constrained by authority to hold that there is no right to a pension (see *Pillai's*[7] case, *supra*). The remedy, if granted, would not be complete under the Specific Relief (Malay States) Ordinance, 1950. Whether under the new or the old Regulations, the concession that service could be broken was merely for continuity of service and not for inclusion of the period of non-service. Further, in my view this application for mandamus should be refused owing to the long delay. I rule that the motion for mandamus does not lie and must be refused with costs.

Motion refused.

Solicitors: *Lovelace & Hastings.*